UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

ANNA MARIA JOHNSON, Appellant, v. DEPARTMENT OF THE ARMY, Agency.	DOCKET NUMBER DC-1221-21-0632-W-1 DATE: July 28, 2023

THIS ORDER IS NONPRECEDENTIAL[1]

Rosemary Dettling, Esquire, Washington, D.C., for the appellant.

Jessica L. Linney, Esquire, and Terri Farr, Esquire, Fort Bragg, North Carolina, for the agency.

BEFORE

Cathy A. Harris, Vice Chairman
Raymond A. Limon, Member

REMAND ORDER

¶1 The appellant has filed a petition for review of the initial decision, which dismissed her individual right of action (IRA) appeal for lack of jurisdiction. For the reasons discussed below, we GRANT the appellant's petition for review, VACATE the initial decision regarding the findings about the appellant's first

[1] A nonprecedential order is one that the Board has determined does not add significantly to the body of MSPB case law. Parties may cite nonprecedential orders, but such orders have no precedential value; the Board and administrative judges are not required to follow or distinguish them in any future decisions. In contrast, a precedential decision issued as an Opinion and Order has been identified by the Board as significantly contributing to the Board's case law. *See* 5 C.F.R. § 1201.117(c).

disclosure, and REMAND the appeal to the Washington Regional Office for further adjudication in accordance with this Remand Order. We AFFIRM the administrative judge's findings that the Board lacks jurisdiction over the appellant's second and third disclosures, albeit on slightly different grounds than relied on by the administrative judge, as explained below.

BACKGROUND

¶2 The appellant, a former GS-11 Nurse (Patient Safety Manager) in the agency's Quality Services Division (QSD), was terminated during her probationary period, effective December 16, 2019, for misconduct and poor performance. Initial Appeal File (IAF), Tab 1 at 8-10. She filed a complaint with the Office of Special Counsel (OSC), alleging that she was terminated in retaliation for making protected disclosures in violation of 5 U.S.C. § 2302(b)(8). *Id.* at 13-35. Specifically, she alleged that she was terminated because she had disclosed to her supervisor that a member of management threatened potential whistleblowers and referred to whistleblowing as a "career-killer" (disclosure 1), because she objected to QSD's decision to report a Patient Safety Event (PSE) to The Joint Commission "in direct defiance of the decision of Command Leadership" (disclosure 2), and because she objected to her supervisor's decision to restructure a Chartered Investigation Team (CIT) report to remove the "Immediate Action Taken" section so that "the Department involved [would not] be given credit for their swift corrective actions" (disclosure 3). *Id.* at 21-29.

¶3 After OSC issued its close out letter, the appellant filed an IRA appeal with the Board, alleging whistleblower reprisal. IAF, Tab 1. The administrative judge issued an order on jurisdiction, setting forth the applicable legal standard for establishing jurisdiction and affording the appellant the opportunity to present evidence and argument establishing jurisdiction over her appeal. IAF, Tab 3. The appellant responded, asserting that the three above-listed disclosures were protected and she believed that they evidenced a violation of the merit system

principles, as set forth in 5 U.S.C. § 2301.[2] IAF, Tab 5 at 4-6. The appellant further alleged that, as a result of her making these disclosures, the agency terminated her from her position. *Id.* at 6.

¶4 Without holding a hearing, the administrative judge issued an initial decision dismissing the appeal for lack of jurisdiction. IAF, Tab 9, Initial Decision (ID). Specifically, the administrative judge explained that a violation of the merit system principles is not an independent violation of law, rule, or regulation, and because it was the appellant's sole argument for finding her disclosures protected, she had not made a nonfrivolous allegation of Board jurisdiction. ID at 8-10.

¶5 The appellant filed a petition for review, arguing that administrative judge erred in dismissing her appeal because she had made protected disclosures and was subject to personnel actions thereafter. Petition for Review File, Tab 1 at 7. The agency did not file a response to the petition for review.

DISCUSSION OF ARGUMENTS ON REVIEW

¶6 Under the Whistleblower Protection Enhancement Act of 2012, the Board has jurisdiction over an IRA appeal if the appellant has exhausted her administrative remedies before OSC and makes nonfrivolous allegations that (1) she made a protected disclosure described under 5 U.S.C. § 2302(b)(8) or engaged in protected activity described under 5 U.S.C. § 2302(b)(9)(A)(i), (B), (C), or (D); and (2) the disclosure or protected activity was a contributing factor in the agency's decision to take or fail to take a personnel action as defined by 5 U.S.C. § 2302(a). *Edwards v. Department of Labor*, 2022 MSPB 9, ¶ 8; *Salerno v. Department of the Interior*, 123 M.S.P.R. 230, ¶ 5 (2016). A nonfrivolous allegation of a protected whistleblowing disclosure is an allegation of facts that, if proven, would show that the appellant disclosed a

[2] The appellant submitted an amended jurisdictional response, IAF, Tab 5, which appears identical to her original response, IAF, Tab 4.

matter that a reasonable person in her position would believe evidenced one of the categories of wrongdoing specified in 5 U.S.C. § 2302(b)(8)(A). *Salerno*, 123 M.S.P.R. 230, ¶ 6. The test to determine whether a whistleblower has a reasonable belief in the disclosure is an objective one: whether a disinterested observer with knowledge of the essential facts known to and readily ascertainable by the employee could reasonably conclude that the actions of the agency evidenced one of the categories of wrongdoing specified in 5 U.S.C. § 2302(b)(8)(A). *Id.*

¶7 As explained by the U.S. Court of Appeals for the Federal Circuit (Federal Circuit), at the jurisdictional stage, the appellant need only assert "allegations that are 'not vague, conclusory, or facially insufficient,' and that the appellant 'reasonably believe[s]' to be true. . . ." *Hessami v. Merit Systems Protection Board*, 979 F.3d 1362, 1367 (Fed. Cir. 2020) (quoting *Piccolo v. Merit Systems Protection Board*, 869 F.3d 1369, 1371 (Fed. Cir. 2017)). Thus, the appellant makes a nonfrivolous allegation if she alleges "sufficient factual matter, accepted as true, to state a claim that is plausible on its face." *Hessami*, 979 F.3d at 1369.

¶8 As set forth below, we find that the appellant made a nonfrivolous allegation that she made a protected disclosure when she disclosed that an agency manager threatened whistleblowers (the first disclosure) and that this disclosure was a contributing factor in her termination. However, we find that the appellant failed to make a nonfrivolous allegation that her second and third disclosures, i.e. objecting to the reporting of the PSE and the restructuring of the CIT report, were protected because they were vague, conclusory, and at most constituted a policy disagreement with agency managers. Nevertheless, because we find that the appellant nonfrivolously alleged Board jurisdiction over her first disclosure, we remand the appeal for the administrative judge to further address the first disclosure.

The appellant nonfrivolously alleged that she made a protected disclosure when she disclosed that an agency manager threatened whistleblowers and that this disclosure was a contributing factor in her termination.

¶9 In her first disclosure, the appellant alleged that she reported to her supervisor that, during a morning huddle, a member of management stated, "[a]nd if you are considering being a 'whistleblower' (telling people outside of the department) what is occurring in QSD, it is a 'career-killer.' Remember what happened to the last 'whistleblower.'" IAF, Tab 5 at 5. The appellant asserted that this statement violated the merit system principles, specifically 5 U.S.C. § 2301(b)(9)(A), which states "[e]mployees should be protected against reprisal for the lawful disclosure of information which the employees reasonably believe evidences a violation of any law, rule, or regulation." IAF, Tab 5 at 5. In the initial decision, the administrative judge found that the appellant failed to allege that this statement violated a law, rule, or regulation, or any of the other categories of wrongdoing set forth in 5 U.S.C. § 2302(b)(8)(A), because the appellant had only cited to the merit system principles as the alleged law, rule, or regulation violated. ID at 8-9.

¶10 Accepting the allegations as true, as we must at this stage of the proceedings, we find that the appellant has alleged sufficient facts to state a claim that is plausible on its face. Specifically, the appellant alleged that she disclosed to her supervisor that a member of management issued a threat to potential whistleblowers, which would not only violate 5 U.S.C. § 2301(b)(9)(A), as she alleged, but would also constitute a prohibited personnel practice under 5 U.S.C. § 2302(b)(8) and (b)(9). IAF, Tab 5 at 5. 5 U.S.C. § 2302(b)(8) and (b)(9) make it unlawful for an agency to, among other things, threaten to take a personnel action against a whistleblower. Thus, a manager threatening the career of whistleblowers would violate 5 U.S.C. § 2302(b)(8) and (b)(9). Accordingly, we find that the appellant reasonably believed that her disclosure evidenced a violation of law, rule, or regulation, and thus, she nonfrivolously alleged that she

made a protected disclosure, even though she cited only to a violation of a merit system principle. *See McDonnell v. Department of Agriculture*, 108 M.S.P.R. 443, ¶¶ 2, 10-13 (2008) (finding that the appellant made a nonfrivolous allegation that she made a protected disclosure because her alleged disclosure concerned hiring and selection improprieties under 5 U.S.C. § 2301 that could have constituted prohibited personnel practices under 5 U.S.C. § 2302(b)(6) and (b)(12)).

¶11 The appellant also nonfrivolously alleged that her protected disclosure was a contributing factor in her termination. To satisfy the contributing factor criterion at the jurisdictional stage of an IRA appeal, the appellant need only raise a nonfrivolous allegation that the fact of, or the content of, the protected disclosure was one factor that tended to affect the personnel action in any way. *Salerno*, 123 M.S.P.R. 230, ¶ 13. One way to establish this criterion is the knowledge/timing test, under which an employee may nonfrivolously allege that the disclosure was a contributing factor in a personnel action through circumstantial evidence, such as evidence that the official who took the personnel action knew of the disclosure and that the personnel action occurred within a period of time such that a reasonable person could conclude that the disclosure was a contributing factor in the personnel action. *Id.*

¶12 The Board has found that personnel actions taken within approximately 1 to 2 years of the protected disclosure satisfy the knowledge/timing test. *Peterson v. Department of Veterans Affairs*, 116 M.S.P.R. 113, ¶ 16 (2011). Here, the appellant alleged that she informed her supervisor of the retaliatory statement on May 22, 2019, and that he terminated her effective December 16, 2019, approximately 7 months later. IAF, Tab 5 at 5-6. Accordingly, because the appellant satisfies the knowledge/timing test, she has nonfrivolously alleged that her protected disclosure was a contributing factor in her termination. Thus, she is entitled to a hearing on the merits of her first disclosure. *See Salerno*, 123 M.S.P.R. 230, ¶ 5.

The appellant failed to nonfrivolously allege that she made a protected disclosure when she objected to the reporting of the PSE (second disclosure) and when she objected to changes made to the CIT report (third disclosure).

¶13 We find that the appellant failed to nonfrivolously allege that either her second or third disclosures were protected because her disclosures were conclusory, vague, and evidence nothing more than a policy disagreement with agency managers. Specifically, regarding the second disclosure, the appellant alleged that she objected to the fact that the QSD managers, including her supervisor, notified The Joint Commission of a PSE that had been deemed non-reportable by the Command's leadership, telling her supervisor, "I do not agree with this. This is a lack of integrity. And it makes me uncomfortable working with people this dishonest." IAF, Tab 5 at 5. As an initial matter, the appellant fails to explain how managers reporting a PSE to The Joint Commission would constitute the type of wrongdoing addressed by the whistleblower protection statutes. In addition, we find that her disclosure was vague, conclusory, and was nothing more than a general accusation of dishonesty against agency managers that lacked sufficient details to be protected under 5 U.S.C. § 2302(b)(8)(A). *See Salerno*, 123 M.S.P.R. 230, ¶ 6 (explaining that disclosures must be specific and detailed, not vague allegations of wrongdoing); *Rzucidlo v. Department of the Army*, 101 M.S.P.R. 616, ¶ 13 (2006) (same).

¶14 For the same reason, we find that the appellant's third disclosure is not protected. Specifically, the appellant claims that she informed her supervisor that she could not agree with his restructuring of the CIT Report, i.e. removing the Immediate Action Taken section, because "it undermines the integrity of the report," as he removed the section so that "the Department involved would not be given credit for their swift corrective actions." IAF, Tab 5 at 6. Again, the appellant fails to explain how the removal of this section constitutes the type of wrongdoing addressed by whistleblower protection statutes. Furthermore, the appellant's disclosure itself was vague, conclusory, and amounts to a general

accusation that her supervisor lacked integrity. Therefore, it is not protected under 5 U.S.C. § 2302(b)(8)(A). *See Salerno* 123 M.S.P.R. 230, ¶ 6; *Rzucidlo*, 101 M.S.P.R. 616, ¶ 13.

¶15 The appellant's second and third disclosures amount to nothing more than general allegations of wrongdoing based on policy disagreements with agency managers. These types of allegations are not protected under 5 U.S.C. § 2302(b)(8)(A). *See Webb v. Department of the Interior*, 122 M.S.P.R. 248, ¶ 8 (2015) (explaining that general philosophical or policy disagreements with agency decisions or actions are not protected). As the Federal Circuit has noted, whistleblower protected statutes "[are] not a weapon in arguments over policy or a shield for insubordinate conduct." *Lachance v. White*, 174 F.3d 1378, 1381 (Fed. Cir. 1999). Accordingly, the appellant has failed to make a nonfrivolous allegation that her second or third disclosures are protected. Therefore, we remand this appeal only as it relates the findings of the first disclosure as explained above.

ORDER

¶16 For the reasons discussed above, we remand this case to the Washington Regional Office for further adjudication in accordance with this Remand Order. On remand, the administrative judge should inform the appellant of her burden to establish a prima facie case of whistleblower reprisal and should inform the agency of its burden, should the appellant meet her burden of proof, to prove by clear and convincing evidence that it would have taken the same personnel action

in the absence of the appellant's protected disclosure. The administrative judge should conduct the hearing requested by the appellant. IAF, Tab 1 at 2.

FOR THE BOARD: /s/ for

Jennifer Everling
Acting Clerk of the Board

Washington, D.C.